No. 96-1805 (H)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Supreme Court, U.S.
FILED
JUN 27 1997
CLERK

PROMISE DOE, JANE ROE, KIMBERLY C.,
RUSS C., AND SMALL WORLD MINISTRIES, INC.,
Petitioners,

- v. -

DON SUNDQUIST, Governor of the State of Tennessee, in his official capacity, JOHN KNOX WALKUP, Attorney General of the State of Tennessee, in his official capacity, and LINDA RUDOLPH, in her official capacity as the Commissioner of the Department of Human Services for the State of Tennessee,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY IN SUPPORT OF PETITION

Jay Alan Sekulow*
Walter M. Weber
American Center for Law & Justice
1000 Thos. Jefferson St. N.W.
Suite 609
Washington, DC 20007
(202) 337-2273

Larry Crain
Kevin Theriot
American Center for Law & Justice
101 Westpark Dr.
Suite 250
Brentwood, TN 37027
(615) 376-2622

Francis J. Manion
New Hope Life Center, ACLJ-New Hope
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

* *Counsel of Record*

Attorneys for Petitioners

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REPLY IN SUPPORT OF PETITION

Respondents have elected not to file a brief opposing the petition for certiorari in this case. Amici Teresa Evetts Horton et al., however, filed a 20-page brief in opposition with a 53-page appendix. Petitioners therefore respond briefly to these amici.

The State of Tennessee, by statute enacted in 1996,[1] has taken previously confidential adoption records and retroactively opened them, on demand, to adult adoptees and, by extension, to anyone else to whom the adoptee wishes to disseminate the information. This means that those women who placed children for adoption and who, for uniquely personal reasons, have either kept the adoption a secret or otherwise declined to break the confidential seal guarding their identities for the past decades, now suddenly face the involuntary disclosure, to their biological children and to others, of not only their

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[1]The challenged statute is not currently in effect. The Sixth Circuit's ruling below in the present case was explicitly "without prejudice to any right to seek relief from the Tennessee courts on the non-federal issues." Pet. App. 12a. Accordingly, when the Sixth Circuit dissolved its stay in this case, Pet. App. 17a-18a, petitioners filed a state-court action challenging the same statute exclusively under state law. The state trial court initially granted a stay, then denied a preliminary injunction. Before the stay expired, the state court of appeals granted its own stay. Most recently, the appeals court entered an order allowing petitioners to pursue an interlocutory appeal and extending the stay pending further adjudication. Order, *Promise Doe v. Sundquist*, No. 01-A-01-9705-CV-00209 (Tenn. Ct. App. June 12, 1997).

identities but also much highly personal information. Furthermore, by the same statute, Tennessee has prospectively eliminated the possibility of maintaining the confidentiality of adoption records vis-a-vis adult adoptees. This means that a woman experiencing an out-of-wedlock pregnancy can get a secret abortion but not a secret adoption. The statute thereby skews the decisionmaking process and subtly but firmly pressures the woman to abort her child rather than place her child for adoption.

Petitioners -- biological mothers of adopted children, adoptive parents, and an adoption agency -- challenge the Tennessee statute as unconstitutional under the Fourteenth Amendment to the U.S. Constitution. Petitioners contend that the statute violates familial, reproductive, and personal privacy, and offends the right to due process of law.

In their brief in opposition, amici do not so much contest the appropriateness of this case for plenary review as dispute the merits of petitioner's arguments.

Illusory need for new statute

Some of the amici assert that they are adopted persons who have a strong medical need for access to their adoption records. Opp. at 4-5. But under prior Tennessee law, adoptees could already obtain "[a]ny necessary information" from adoption records "upon a written motion" and a showing that "it is in the best interest of the child or of the public to have such

information disclosed." Former Tenn. Code Ann. § 36-1-131(a) (Pet. App. 75a).[2] Thus the adoptees' health concerns, while important, do not necessitate the broad statutory breach of privacy at issue in this case. "Access on demand" is not essential when "access as necessary" suffices.

Other amici assert that they are birth parents who would welcome contact from their biological children. Opp. at 1-3. But prior Tennessee law already enabled adopted children to obtain identifying information from consenting parents. Opp. at A15-16 (setting forth former Tenn. Code Ann. § 36-1-141); *see also* Pet. App. 84a (1988 letter from Tennessee Department of Human Services explaining the former process). The new, challenged Tennessee law therefore only affects unconsenting parents – including petitioners Promise Doe and Jane Roe – and not amici. Amici's own statistics reflect that unconsenting parents may represent more than a quarter of the biological parents of adoptees in a given state. *See* Opp. at 2 n.1 (50 of 188 in Arizona declined to consent).

A third group of amici are adoptive parents who support their children's efforts to identify their biological parents and to obtain their adoption records. Opp. at 3-4. But adoptive parents are already free to disclose whatever information they have – including

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[2]The "public interest" portion of this statute would presumably encompass such matters as tracing the source of epidemics or pursuing other pressing public health needs.

personal information about themselves -- regardless of the Tennessee adoption statute. The new statute challenged in this case goes much further, revealing the identities and private information about unconsenting adoptive (and biological) parents.

Amici, in short, are not really arguing their own interests -- which were largely accommodated under prior law -- so much as they are disparaging the interests of petitioners and others who are similarly situated. Under old and new Tennessee law, adoptees can obtain necessary health information. Under old and new Tennessee law, biological parents can consent to disclosure of their identities to adoptees. And under old and new Tennessee law, adoptive parents can disclose to adopted children whatever personal information about themselves that they wish. The burden of the new Tennessee law rests squarely, not on amici, but on unconsenting biological parents and unconsenting adoptive parents who wish to preserve the confidentiality of adoption records.

Illusory safeguards

Amici contend that there are significant safeguards to protect petitioners. These supposed safeguards are in fact illusory.

Amici, for example, point to the exclusion, from disclosure, of "information relating to the counseling of a biological mother regarding crisis pregnancy counseling" [sic], *see* Opp. at 6, A3, A4, A6. Yet this

provision is irrelevant in all cases where the mother does not receive "crisis pregnancy counseling." Furthermore, it is wholly unclear how much information this exclusion really covers.

Amici also point to the protection of "home studies" and other evaluations of prospective adoptive parents "except and to the extent that such studies are expressly included in a report to the court," *see* Opp. at 7, A3, A4, A6. But the exception for reports to the court – the very purpose of conducting such home studies and evaluations – plainly swallows the rule.

Amici point finally to the "contact veto" provisions contained in the new Tennessee statute. Opp. at 8. But these provisions provide largely empty safeguards. First, the contact veto provisions place no limitations on the disclosure of adoption records (which is the crux of petitioners' informational privacy claim) to the adoptee or others to whom the adoptee wishes to disseminate the information. Second, the vagueness of the provision – which does not define "contact" – seriously impairs its enforceability. Third, the penalties for violation of a "contact veto" are illusory: enforcement would only draw greater attention to the very matter the biological mother wished to keep private; moreover, enforcement would typically require a mother to proceed against her own child, an unlikely prospect.

Invocation of "majority"

Amici claim to represent "the vast majority." Opp. at 1. *See also id.* at 2, 4, 17, 20. Amici label petitioners as part of "a very small minority." Opp. at 3. But whether these characterizations are accurate or not is beside the point. Constitutional rights exist precisely to check majoritarian efforts to disregard minority concerns. *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). "[F]undamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Id.*

This case is not about what the majority may want; rather, it is about forcing the minority to suffer the violation of their right to maintain the confidentiality of their identity and of intensely private information that is not necessary to any adoptees, and therefore was not disclosable under prior Tennessee law.[3]

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[3]Amici make the curious and highly counterintuitive claim that forbidding the option of a secret adoption actually increases the rate of adoption and decreases resort to abortion. Aside from the obvious illogic of this argument, petitioners wish to note the unhelpfulness of amici's supposed statistical evidence, *see* Opp. at 18. Amici's chart makes no pretense of controlling for other variables that might explain the different figures. Furthermore, amici's own chart shows a higher abortion rate for Alaska -- an open records state -- than for any of the four states surrounding Kansas -- each of which states has closed adoptions. Finally, amici ignore the fact that those living in an open records state like Kansas may simply be forced to have their adoption handled elsewhere.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Jay Alan Sekulow*
Walter M. Weber
American Center for Law
& Justice
1000 Thos. Jefferson St. N.W.
Suite 609
Washington, DC 20007
(202) 337-2273

Larry Crain
Kevin Theriot
American Center for Law
& Justice
101 Westpark Dr.
Suite 250
Brentwood, TN 37027
(615) 376-2622

Francis J. Manion
New Hope Life Center,
ACLJ-New Hope
6375 New Hope Rd.
New Hope, KY 40052
(502) 549-7020

*Counsel of Record

Attorneys for Petitioners

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